

Supreme Court, U. S.,

FILED

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MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-357

LARRY DALE PATTY,

*Petitioner*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## REPLY BRIEF OF PETITIONER

P. H. Harrington, Jr.  
Farley, Harrington & Sickels, Ltd.  
10560 Main Street, Suite 211  
Fairfax, Virginia 22030

December 23, 1977

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**REPLY BRIEF OF PETITIONER**

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**OPINION BELOW**

The opinion of the Supreme Court of Virginia can be found in 218 Va. 150, S.E. 2d (1977), and is set forth in the Appendix of the Petitioner.

**JURISDICTION**

Petitioner claims that jurisdiction is founded upon 28 U.S.C. §1257(3).

## REBUTTAL TO RESPONDENT'S ARGUMENT

### The Search of the Vehicle was Unconstitutional

Regarding the Commonwealth's forfeiture argument, it should be pointed out that the automobile in question was not on a public highway but on private property open to the public for a limited purpose. And, if the Commonwealth's argument is accepted relating to the seizure of a motor vehicle in which there is probable cause to believe the said motor vehicle contains any controlled substance, then there will never again be issued a search warrant for a motor vehicle because the Commonwealth would have an absolute right to seize it and get around the requirement for a search warrant. Furthermore, one can always look at Virginia Code Section 4-56 which is an integral part of Section 18.2-249, and one immediately sees the language "it shall be the duty of such officer to obtain a legal search warrant" prior to making a seizure. Therefore, the search of the motor vehicle was improper under the Virginia Code, as well as in violation of the Petitioner's rights under the U. S. Constitution.

Regarding the Commonwealth's argument that there was no need for a search warrant, Petitioner points out that the automobile was on private property open to the public for a limited purpose and was also disabled for a period of approximately five (5) hours. Here, just as in *United States vs Mitchell*, 538 F2d 1230 (5th Cir. 1976), the police officers gambled that the factors of exigent circumstances excusing the search warrant requirement would arise, but it differs from *Mitchell* in that there was not only no probable cause to believe that the vehicle contained marijuana and, therefore, the police could not have obtained a search warrant, but the police knew that the car was disabled and the vehicle was on private property open to the public for a limited purpose and could not be moved. The Appellate Court, in *Mitchell*, noted that the police could have obtained a warrant earlier but stressed the fact that an exigent circumstance was present. There were no exigent circumstances in the case at bar, and, contrary to *Mitchell*, the gamble taken by the police failed.

The place at which the Defendant's car was seized was on private property open to the public for a limited purpose and not on an open highway or in a public parking lot and as in *Cardwell vs. Lewis*, 417 U.S. 583. Clearly, there was an expectation of privacy because all of the car doors and the trunk were locked and the car was on gas station property, (the gas station personnel had to break into the car to gain access to the car's interior), and, therefore, this case is readily distinguishable from the facts in *Cardwell*, where there was no breaking into the car and only exterior paint scrapings and a tire molding of the car were taken. Basically, there were suspicious circumstances present and a "police investigation" was called for and should have been made as in *Lawson vs. Commonwealth*, 217 Va. 254, and not an immediate arrest of the Defendant and a search of the vehicle's locked trunk. The *Cardwell* case and the case of *Coolidge v. New Hampshire*, 403 U.S. 443, control this fact situation and require suppression of the evidence.

## CONCLUSION

The search conducted was in violation of the Petitioner's rights under the U. S. Constitution and also under the applicable Virginia Code sections relating to the seizure of motor vehicles being used to transport controlled substances.

Respectfully Submitted,

P. H. HARRINGTON, JR.  
Farley, Harrington & Sickels,  
Ltd.  
Suite 211, 10560 Main Street  
Fairfax, Virginia 22030  
Phone: (703) 591-9200

Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of December 1977, three copies of the Reply Brief of Petitioner were served upon Respondent by depositing same in the United States mail, first class, postage prepaid, in envelopes addressed to the Honorable Anthony F. Troy, Attorney General, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219 and to Paul Ebert, Commonwealth Attorney, 9304 Peabody Street, Manassas, Virginia 22110. I further certify that all parties required to be served have been served, pursuant to Rule 33 of the Rules of the Supreme Court of the United States.

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P. H. HARRINGTON, JR.,  
Farley, Harrington & Sickels,  
Ltd.  
10560 Main Street, Suite 211  
Fairfax, Virginia 22030  
(703) 591-9200